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SUPREME COURT  
STATE OF WASHINGTON

2006 SEP 19 P 3:34

BY C.J. MERRITT

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
Respondent,

v.

GAYLON THIEFAULT,  
Petitioner.

No. 77753-5

REPLY TO MOTION  
TO STRIKE NEW  
ISSUE ARGUED IN  
DEFENDANT'S  
SUPPLEMENTAL  
BRIEF

I. REPLY ARGUMENT

Mr. Thiefault asks this Court to deny the Respondent State of Washington's motion to strike the Petitioner's argument that, on remand, based on double jeopardy principles, Mr. Thiefault may only be resentenced to a standard range sentence for second degree rape.

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First, Respondent's motion is untimely. A timely motion filed following the filing of Petitioner's Supplemental Brief would have allowed this Court to grant a proper motion to allow the State to submit additional briefing, if required.

Second, and more importantly, the Petitioner's argument regarding double jeopardy merely discusses the proper scope of trial court action on remand as an alternative to Petitioner's Sixth Amendment argument regarding the violation of the right to jury trial, and the remedy therefor, which is remand for resentencing to a standard range sentence.

The Respondent's motion mistakes the purpose and importance of the argument advanced regarding double jeopardy. The argument merely addresses a double jeopardy issue that can also certainly be raised at re-sentencing by the defendant if the State again seeks to impose a LWOP (Life Without Parole) sentence. The double jeopardy issue was addressed in the supplemental briefing merely as an additional argument regarding the scope of resentencing on remand. The Petitioner's principal argument, advanced in his Petition for Review and in his Supplemental Brief, is that the Petitioner's right to a jury trial on facts increasing his sentence above that authorized by the jury's verdict,

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was violated, and that such error requires reversal for imposition of a standard range sentence. Petitioner argued in the Petition for Review that the violation of his right to jury trial "can never be harmless, and requires reversal without a second opportunity to prove the factual issue." Petition for Review at p. 18 (citing State v. Hughes, 154 Wn.2d 118, 110 P.3d 192, 205 (2005)). Following the filing of the Petition for Review, the United States Supreme Court, in Washington v. Recuenco, 126 S. Ct. 2546, 165 L. Ed.2d 466, 2006 U.S. LEXIS 5164 (2006), held that violations of the right to jury trial can be harmless. Of course, in this case, the error in not obtaining a jury finding on the facts of the Montana conviction is not harmless, because Mr. Thiefaul's jury was never presented with those facts, and the State has never contended to the contrary.

Respondent mischaracterizes the nature of the Petitioner's entire argument when it contends that it should be entitled under current law, on remand, to submit documentation for purposes of proving comparability, because defense counsel failed to object to comparability. Petitioner is arguing that neither a failure to object to comparability by trial counsel, or even his agreement to comparability, is a valid waiver of the defendant's right to jury trial. Petition for Review, at pp. 12-18; Supplemental Brief, at pp. 17-23.

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The issue presented in this case is whether the defendant has a right to a jury trial on facts necessary to show the comparability of a defendant's conduct in committing a crime in a foreign jurisdiction under a broader foreign statute, and whether the defendant's counsel can waive that jury trial right by counsel's own failure to object to, or agreement to, comparability. As argued in both briefs, if accepted, this argument – that neither action or inaction by counsel can waive the defendant's right to a jury trial – would result in an overruling of current case law making a distinction between an objection by counsel to comparability, a failure to object, or an agreement to comparability. See Petition for Review, at pp. 15-16, and n. 2; Supplemental Brief, at pp. 20-21, and n. 2. The remedy sought by the Petitioner for the violation of this right to a jury determination was plainly set out in the Petition for review and the Supplemental Brief. See Petition for Review, at p. 11 (requesting remedy of "remand for entry of a standard range sentence"); Supplemental Brief, at p. 7 ("Mr. Thieffault's right to a jury determination of comparability facts was violated, and his LWOP sentence must be reversed and the case remanded for imposition of a standard range sentence for second degree rape without inclusion of the Montana conviction."). It is inherent in the treatment of this

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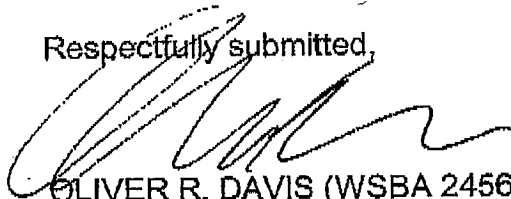
issue by this Court in Hughes, that failure to provide jury proof of facts increasing a sentence above that authorized by the verdict is an error that requires remand for imposition of a standard range sentence. Hughes, 154 Wn.2d at 149-50. The Petitioner's argument regarding double jeopardy merely offers additional discussion of the proper scope of trial court action on remand, expanding upon the basic argument presented in both briefs: that the violation of the jury trial right requires remand for a standard range sentence.

## II. CONCLUSION

Mr. Thieffault, through undersigned counsel, therefore requests this Court deny the Respondent's motion to strike.

DATED this 19 day of September, 2006.

Respectfully submitted,



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